

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES  
NEW YORK BRANCH OFFICE**

**NEW YORK PRESBYTERIAN  
HUDSON VALLEY HOSPITAL,**

**RESPONDENT**

**Case: 02-CA-258244**

**and**

**NEW YORK STATE NURSES ASSOC.,**

**CHARGING PARTY**

*Jamie Rucker, Esq. and Tanya Khan, Esq.,  
for the General Counsel.  
James S. Frank, Esq., Corey Argust, Esq.,  
Donald Krueger, Esq. and Eduardo Quiroga, Esq.,  
for Respondent.  
Joseph Vitale, Esq., for the Charging Party.*

**DECISION**

**STATEMENT OF THE CASE**

JEFFREY P. GARDNER, Administrative Law Judge. The charge in Case 2-CA-258244 was filed on March 17, 2020. The case was initially consolidated with other pending charges and included in a Second Consolidated Complaint issued on May 26, 2020. Thereafter, those previously pending charges were withdrawn leaving only the allegations in this charge to be litigated.<sup>1</sup>

The remaining allegations of the complaint before me allege that on or about March 13, 2020, Respondent violated Section 8(a)(3) and (1) of the Act by unlawfully terminating employee Rosamaria Tyo's employment in retaliation for her protected union and concerted activity. Respondent maintains it lawfully terminated Tyo on March 13, 2020 because she violated its policies and her professional responsibilities as a nurse.

Beginning October 13, 2020, and ending October 21, 2020, pursuant to the Board's decision in *William Beaumont Hospital*, 370 NLRB No. 9 (Aug. 13, 2020), I conducted a trial via Zoom Government, during which all parties were afforded the opportunity to present their evidence.<sup>2</sup> On November 25, 2020, the General Counsel and Respondent each filed timely briefs, with the Charging Party ("the Union") joining in the General Counsel's submission.

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<sup>1</sup> The substantive allegations relating to those prior charges were withdrawn by Order of the Regional Director approving those withdrawals and further confirmed at the hearing.

<sup>2</sup> McLean Johnson, a Board attorney, served as Courtroom Deputy to assist with the Zoom technology during the trial, and is recused from otherwise participating in the case.

Upon consideration of the entire record<sup>3</sup> and the briefs filed, I make the following

## FINDINGS OF FACT

### I. JURISDICTION

Based on the pleadings herein, and its representations at hearing, Respondent admitted and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.<sup>4</sup> In addition, I find that the Union is a Labor Organization within the meaning of Section 2(5) of the Act.

### II. ALLEGED UNFAIR LABOR PRACTICES

#### *Background*

Respondent is a 128-bed community hospital engaged in the business of providing health care services for the northern Westchester County and southern Putnam County region of the state of New York at its facility located at 1980 Crompond Road, Cortlandt Manor, NY, the only facility involved herein. The Charging Party Union has represented a unit comprised of

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<sup>3</sup> Respondent filed a Motion to Correct the Record on November 24, 2020 and submitted a proposed errata sheet to the court reporting agency with 64 proposed corrections. The court reporting agency performed a transcript audit, which concurred with nearly all of Respondent's proposed corrections. On December 2, 2020, the General Counsel filed a Limited Opposition to Respondent's Motion, opposing only 3 of Respondent's proposed corrections and adding 1 additional proposed correction of its own. Respondent's Motion is granted with respect to the 61 unopposed corrections, which are hereby incorporated into the record. As to the disputed proposed corrections, based on my review of the parties' positions, the court reporting agency's audit, the context in which the proposed corrections appear and my recollection of the testimony, I agree with the General Counsel's proposed corrections on (i) page 45, line 13 and (ii) page 463, line 11; I agree with Respondent's proposed correction on page 634, line 20; and I accept the General Counsel's additional proposed correction on page 633, line 11. Those corrections are also hereby incorporated into the record.

<sup>4</sup> Respondent previously stipulated that it is engaged in commerce within the meaning of the Act in the parties' October 2018 Stipulated Election Agreement, wherein it was also stipulated that the Union is a Labor Organization.

registered nurses ("RNs") at this facility since it was certified by the Board in December 2018. Rosamaria Tyo is a registered nurse who until March 13, 2020, was employed by Respondent and was a member of the unit.

Tyo testified at the hearing regarding her employment with Respondent, and the events leading up to her discharge. Also testifying at the hearing for the General Counsel were Union consultant Carol Lynn Esposito, RNs Andrew Askew, Kevin Lazaro and Donna L. Shores, and Union representative Theodric Figurasin. Respondent offered the testimony of Clinical Nurse Coordinator Nancy Kelly and Vice President of Human Resources Sedrick J. O'Connor.

### **Tyo's Employment and Experience**

Prior to her termination, Rosamaria Tyo had been a registered nurse with over fifteen years of experience working for Respondent, including the last four and a half years as an operating room nurse ("OR nurse"). She previously worked in both the emergency room and the telemetry unit. She had a history of positive performance reviews throughout her tenure with Respondent. At the time of her termination her immediate supervisor was Nancy Kelly.

As an operating room nurse, Tyo's duties were to facilitate surgical procedures, working with a surgical team, which typically consisted of an anesthesiologist, one or more surgeons, a physician assistant, a scrub technician and one or more nurses, including a circulating nurse, in the room. A float nurse was also typically available outside of the operating room to assist or relieve the OR nurses, if needed.

One of the jobs of the circulating nurse is to document the surgical procedure in the emergency medical record ("EMR"). This documentation includes all pertinent events beginning before the procedure, continuing during the surgery through to the delivery of the patient to the recovery room. One nurse is always assigned as primary circulating nurse for the procedure and is responsible for the EMR documentation.

Tyo was active with the Union, and her active support was known to Respondent. She served on the Union's contract bargaining committee, and she also had a history of raising

issues with management regarding its overtime and compensation policies, which were the subjects of disputes in bargaining.<sup>5</sup>

### **Respondent's Operating Room Practices**

Respondent's facility has six operating rooms, of which five were actively used for surgical procedures. Respondent has a rigorous training program for nurses assigned to its operating rooms. Nurses who are new to working in an operating room, including experienced RNs without operating room experience, must complete a course called Peri-Op 101, which includes instruction and observation, and culminates in a test which the RN must pass in order to be certified.

Even after successful completion of the Peri-Op 101, including certification, new operating room nurses continue working with a preceptor. A preceptor is not a supervisor, but more of a mentor for nurses who are either new to the position, to the hospital, or to the particular department. The preceptor helps facilitate the education of the orientee and helps an orientee develop experience as an operating room nurse. There is no specific training provided to be a preceptor, and nurses on orientation may or may not be assigned to one specific preceptor.

Preceptors often work alongside orientees, but will leave orientees alone in certain circumstances, including in the operating room during surgeries. Indeed, preceptors and orientees routinely cover each other for breaks, and sometimes orientees are assigned to work alone for the entirety of a procedure. This is particularly true of orientees who have progressed through their orientation.

Where a preceptor and orientee are working together, either can be assigned as the circulating nurse for the procedure. Absent specific instructions about particular concerns

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<sup>5</sup> Tyo also had earlier engaged in additional concerted activity when she lodged a complaint with the New York Department of Labor (and/or Governor's office). No direct evidence was introduced to demonstrate Respondent was aware of these efforts.

management may have about an orientee, it is left to the discretion of the preceptor how much independence to give their orientees, based on the preceptor's observation of the orientee's skills and abilities. Once the preceptor has a certain level of confidence in a nurse's abilities, the role of preceptor gradually transitions from an instructor role to one primarily serving as an observer.

During surgeries, nurses routinely leave the operating room for short periods – to retrieve surgical items, or to use the bathroom, e.g. – with no formal coverage needed, and no documentation of that brief absence required. However, for longer absences – shift breaks or lunch periods, e.g. – a nurse must secure coverage for that period of absence, and the recording nurse should properly document that exchange. In addition, operating room nurses are equipped with a “mobile heartbeat” cellphone, which serves as a constant line of instant communication with other hospital staff should an emergency arise at any point during a surgery requiring their immediate attention.

### **Kevin Lazaro's Nursing Experience**

Kevin Lazaro had already been a registered nurse for approximately three years before being hired to work at Respondent's facility in May 2019. He had previously worked in a hospital setting, but did not have prior operating room experience at the time of his hire. As such, Lazaro was required to begin his tenure with Respondent going through the Peri-Op 101 process.

Lazaro successfully completed his Peri-Op 101 course in the Fall of 2019, and passed his certification test in November 2019. Prior to his passing the test, Lazaro had observed and/or participated in multiple operating room surgeries of varying degrees of difficulty. After November 2019, Lazaro continued participating in surgeries with increasing levels of individual responsibility. By January 31, 2020, he was judged by the hospital's Director of Surgical Services to be meeting all expectations.

At the time of the events leading up to and underlying this case, Tyo had been serving as a preceptor for Lazaro for an extended period. She had developed confidence in Lazaro's

abilities and believed based on her observations that he had reached the point where he required little guidance. Lazaro's assignments, which included significant autonomy and solo responsibility including during complicated procedures, reflected a similar belief on the part of hospital management.

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By February 25, 2020, Lazaro had been scheduled to be alone in the operating room for the entirety of multiple procedures and had been scheduled on numerous other occasions to cover lunch and/or breaks alone during procedures. Specifically, he had worked by himself for the entirety of procedures on at least three prior occasions, January 7, 8 and 21, 2020. And on the very day of the events at issue, February 25, 2020, Lazaro was scheduled to be by himself in the operating room while his preceptor, Tyo, went on break.

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Nancy Kelly testified that she was concerned about Lazaro never having specifically worked on a posterior cervical laminectomy with microdiscectomy previously. However, she acknowledged that Lazaro had previously worked on a posterior cervical fusion surgery which was at least as complicated if not more complicated than the February 25, 2020 procedure he and Tyo were assigned to.

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Kelly testified that to her knowledge Float Nurse Nicky Perkins, whom she assigned to cover for Tyo and Lazaro for their lunch break that day during the surgery, had not recently participated in any orthopedic or neurology surgeries. Indeed, Kelly acknowledged that she did not know whether Perkins, a "traveler nurse," had ever worked on that specific surgery at all. A traveler nurse is a contracted nurse employed by Respondent for a set period of time, typically thirteen weeks. This was Perkins' first tour of duty with Respondent, and Kelly acknowledged she was unaware whether Perkins had worked on this type of surgery in the past, or what surgical experience she may have had.

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Nevertheless, Perkins was assigned, alone, to lunch coverage for ORs 5 and 6 that day, and she took over for Tyo and Lazaro during the lunch break in OR 5 for at least 45 minutes. Despite no specific knowledge of Perkins's surgical experience, Kelly testified that she was comfortable in general with Perkins being alone.

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### **February 25, 2020 Incident and Aftermath**

On February 25, 2020, Tyo and Lazaro were assigned to work together on an early morning surgery followed by a second surgery - a posterior cervical laminectomy with microdiscectomy. Lazaro was assigned to serve as primary circulating nurse for the day. Lazaro and Tyo were assigned to relieve each other for their 15-minute morning breaks, although a third nurse was assigned as an additional option to relieve them for that break. In addition, Perkins, working as the Float Nurse, was assigned to relieve Tyo and Lazaro for their scheduled 30-minute lunch break that day.

Tyo had experience in this specific procedure but Lazaro did not. Kelly testified that she was comfortable enough with Tyo's experience in this procedure to allow Tyo to precept Lazaro and further believed it would be valuable experience for Lazaro to participate in this type of procedure, which was not done with any regular frequency at the facility. In posterior cervical laminectomies, surgeons occasionally use hardware to stabilize the patient's spine and use neural monitoring as a precaution for the patient and surgeon so that the patient is not harmed. Nurses can assist the surgeons with these devices, though the surgeons are primarily responsible for this.

The surgery began at 9:30 a.m. in OR 5, with both Tyo and Lazaro working together with a team that in addition to nurses included an anesthesiologist, two surgeons, and a very experienced scrub tech.<sup>6</sup> Perkins first arrived to the OR to offer relief to Lazaro and Tyo at 11:00 a.m. that day. However, because the most critical time for the nurses to be present is at the beginning of the surgery, Tyo and Lazaro declined to leave for lunch at that time. Perkins nevertheless remained in the OR at that time because she had not recently seen an orthopedic surgery or neurosurgery case and was interested in observing.

At 11:45 a.m., Tyo and Lazaro took their scheduled lunch break. Before leaving, they "handed off" responsibility to Perkins, with Tyo describing the patient and details of the case to

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<sup>6</sup> Kelly testified that an experienced scrub tech is a factor she considers in determining the appropriateness of nurse assignments.

Perkins. This type of handoff, or transfer of responsibility is standard and required to ensure seamless nurse coverage for the surgical patient. At approximately 12:30 p.m., Tyo and Lazaro returned from lunch, and Perkins transferred responsibility back to them. Perkins left OR 5 at 12:45 p.m. and told Lazaro she would be available to assist if needed. The handoffs to and from Perkins for Tyo's and Lazaro's lunch break were both recorded in the EMR.

Meanwhile, at approximately the same time that day, Chief Nursing Officer Ophelia Byers was scheduled to conduct a "Town Hall Meeting" in the ground floor conference room of the facility. The conference room is approximately a 1-2 minute walk from the location of the operating rooms. The meeting was scheduled to take place from noon to 1:00 p.m., and nurses were invited to attend.

At 12:49 p.m., Tyo left the operating room to go to the first floor conference room. Before leaving, she asked Lazaro if he was comfortable being in the room without her and Lazaro said he was. Tyo told Lazaro that she could be reached by personal phone or the mobile heartbeat, and reminded him that Perkins was nearby as well if necessary. Because Lazaro had worked in the operating room with multiple other similar surgeries during his tenure with Respondent, Tyo felt comfortable leaving Lazaro alone at this point in the surgery, which was at a point where there was little for the nurses to do. Nothing arose requiring Lazaro to reach out for Tyo or Perkins during Tyo's absence.

Tyo was absent from the operating room for 28 minutes, including the short walks to and from the ground floor conference room. When she arrived just outside the conference room, she joined with six other hospital employees, along with three Union representatives, including Union representative Theodric Figurasin, and waited briefly for Byers's scheduled meeting to finish up. Once the meeting concluded, the assembled group entered the conference room just after 1:00 p.m.

The group approached Byers, and sought to persuade Byers to attend the collective bargaining negotiations that had been ongoing between Respondent and the Union. They tried to hand Byers signed cards from employees regarding merit wage increases for nurses, which had been among the subjects of dispute between the parties. Byers reacted angrily, chastising



the employees for being disrespectful and describing their action of confronting her without advance notice as unacceptable. She told the group that this was not the way to get in touch with her, and singled out Tyo by saying "Rosa knows better than this." Byers left the room abruptly, refusing to accept the cards offered by the group.

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Almost immediately after the employees' arrival to the conference room, Byers's executive assistant, Nancy Cito,<sup>7</sup> contacted security which responded quickly. O'Connor was also contacted, and immediately headed toward the conference room. On his way there, he encountered Byers and Cito, who apparently told him about the unscheduled portion of the meeting. By the time he reached the conference room, the employees – including Tyo - had mostly disbursed, and security was questioning the Union representatives – including Figurasin - about their presence at the facility before being removed.

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Tyo arrived back at the operating room at 1:16 p.m. Lazaro was assigned to be the primary individual responsible for documenting the procedure in the EMR, which he had done previously. Lazaro's notes did not document Tyo's departure from the OR for this period. There is general agreement that Tyo's absence for that duration should have been documented. However, no evidence was presented that Lazaro or Tyo were disciplined for that omission.

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### **The Events following Tyo's Concerted Activity**

Immediately after the unscheduled meeting between the employees and Byers, Respondent launched an investigation seeking to identify everyone who participated in the meeting. The investigation was directed from the highest levels of management to get to the bottom of what it labeled an "ambush" of Byers. The emails circulating among management officials carried the subject line "NYSNA just ambushed Ophelia in a meeting."

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Video and photographic images were reviewed to identify the participants of the meeting, including Tyo. And once Tyo was identified, the investigation continued with a further

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<sup>7</sup> Neither Byers nor Cito testified at the hearing. Tyo and Figurasin consistently described Byers's reaction as angry and indignant in the face of the employees having confronted her together unannounced that day.

investigation of Tyo's specific participation, including her specific arrival to and departure from the meeting, travel to and from the meeting, whereabouts and work assignments for the day. By contrast, no investigation had initially been prompted by her actual departure or absence from the operating room and surgery itself, though it was known to multiple individuals in the operating room, including the surgeons themselves. Dr. Saran Rosner, the lead surgeon for the procedure at issue later advocated on Tyo's behalf, describing her as one of the top operating room nurses at the facility, having "always demonstrated the highest of professional standards."

Following Respondent's investigation of Tyo's absence, Tyo was terminated on March 13, 2020, allegedly for "patient abandonment." The New York State Board of Nursing, part of the New York State Education Department, the body which investigates allegations of patient abandonment, describes abandonment as occurring, in pertinent part, when: "[a] nurse, who has accepted a patient care assignment and is responsible for patient care, abandons or neglects a patient needing immediate professional care without making reasonable arrangements for the continuation of such care." (GC Exh. 3).

### III. CREDIBILITY DETERMINATIONS

My factual findings set forth above are based on my observations of witnesses' testimonial demeanor.<sup>8</sup> I found employee Rosamaria Tyo to be extremely credible. She testified consistently on direct and cross examination. Her recollection of the events was detailed and specific, and on the limited occasions when she did not immediately recall an answer, she readily acknowledged as much.

I also found nurse Lazaro to be very credible. No longer employed by Respondent, he had little to no stake in the outcome of the litigation, and he appeared earnest in trying to accurately convey what he recalled of the events. He admitted to have been unaware that the

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<sup>8</sup> Where credibility resolution is not based on observations of witnesses' testimonial demeanor, the choice between conflicting testimonies rests on the weight of the evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole. *Taylor Motors, Inc.*, 366 NLRB No. 69 slip op. 1 at fn. 3 (2018); *Lignotock Corp.*, 298 NLRB 209, 209 fn. 1 (1990).

events of February 25, 2020 were out of the ordinary at the time, and his testimony struck me as all the more straightforward as a result, including when he acknowledged that he probably ought to have recorded Tyo's absence.

5 I found RNs Andrew Askew and Donna L. Shores all have been credible witnesses in their limited testimony.<sup>9</sup> In particular, Askew's over ten years of experience and non-involvement with this particular matter made him uniquely suited to explain the role of preceptor, and he appeared very candid and convincing in describing how the preceptor uses their judgment in deciding how much independence to afford a preceptee. This included leaving  
10 them alone in an operating room on occasion, which he admitted doing, an admission I find unlikely to have been made if it weren't both true and not particularly unusual.

I also found Union representative Theodric Figurasin to be very credible. I found him to be straightforward in answering questions. He appeared unrehearsed, and was clear and  
15 unevasive in his testimony. He was clear about what he knew and what he did not know about this particular facility and the events he witnessed.

By contrast, I did not find Clinical Nurse Coordinator Nancy Kelly to be particularly credible. While her testimony demonstrated her overall knowledge about the workings of the  
20 hospital, her attempt to support the narrative that Lazaro was not sufficiently experienced in a particular procedure was directly undermined by her own admission that she had no knowledge of the surgical experience, if any, of another nurse (Perkins) whom Kelly herself assigned to cover that same procedure.

25 Moreover, in her testimony, Kelly alternately: (1) denied being aware that Lazaro had previously worked on a surgery as complicated as the 2/25/2020 laminectomy; and (2) admitted

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<sup>9</sup> While I also found the General Counsel's proffered expert, Carol Lynn Esposito, to have testified credibly, I do not rely significantly on her testimony. While her experience and knowledge of the subject matter of nurse ethics is considerable, she did not have first-hand knowledge of the events at issue here, and to the extent she offered an opinion as to what may or may not constitute patient abandonment, I find that expert testimony is not needed to assess whether Ms. Tyo's conduct meets that definition.

that a posterior cervical fusion – a surgery Lazaro previously had worked on - would be even more complicated than the 2/25/2020 procedure. I find this inconsistency on such a crucial point to severely undermine her credibility.

Likewise, I did not find Vice President of Human Resources Sedrick J. O'Connor to be credible. He was inconsistent in his testimony about hospital communications, wavering between trying to depict Tyo as being inaccessible due to spotty phone service at the hospital, while simultaneously maintaining the hospital's communications system were not actually compromised at all.

## ANALYSIS

### **Respondent violated 8(a)(3) and 8(a)(1) of the Act on March 13, 2020, when it discharged Tyo, and Respondent has not met its *Wrightline* burden.**

In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board set forth its causation test for cases alleging violations of the Act turning on employer motivation. First, the General Counsel must make an initial prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. *Wright Line*, 251 NLRB 1083 (1980), 10 enfd. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399-403 (1983). See *Coastal Sunbelt Produce, Inc. & Mayra L. Sagastume*, 362 NLRB No. 126, slip op. at 1 (2015).

Establishing unlawful motivation requires proof that: "(1) the employee engaged in protected activity; (2) the employer was aware of the activity; and (3) the animus toward the activity was a substantial or motivating reason for the employer's action." *Consolidated Bus Transit, Inc.*, 350 NLRB 1064, 1065 (2007), enfd. 577 F.3d 467 (2d Cir. 2009).

If the General Counsel makes that showing, the burden shifts to the employer to "demonstrate that the same action would have taken place even in the absence of the protected conduct." *Septix Waste, Inc.*, 346 NLRB 494, 496 (2006). An employer "cannot simply present

a legitimate reason for its action, but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity.” W.F. Bolin Co., 311 NLRB 1118, 1119 (1993).

5 Here, notwithstanding Respondent’s argument that Tyo’s conduct was so egregious as to remove the protections of Section 7 of the Act, I find that Tyo was clearly engaged in protected activity when she joined with fellow employees to confront Chief Nursing Officer Ophelia Byers with their collective concerns over management’s treatment of merit increases, and to invite Byers to attend bargaining sessions. As such, I find that the General Counsel  
10 proved the first element of its prima facie case.

Respondent was also clearly aware of Tyo’s protected activity. Indeed, Byers made it known that she knew specifically that Tyo was among the employees present, as she singled her out by name, chastising Tyo for “know[ing] better” than to be participating.<sup>10</sup> In addition,  
15 immediately following this incident, Respondent embarked on an investigation to identify everyone who participated in the unscheduled meeting with Byers, and was unquestionably aware of Tyo’s participation. Therefore, there can be no doubt that the General Counsel also proved the second element of its prima facie case.

20 As to the third element of the General Counsel’s prima facie case, it is longstanding Board law that animus need not be proven by direct evidence; it can be inferred from the record as a whole. *Fluor Daniel, Inc.*, 304 NLRB 970 (1991). I find the combination of timing and pretext demonstrate that Respondent’s actions were in retaliation for Tyo’s being a part of the contentious meeting with Byers, protected concerted activity protected by the Act.  
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Here, there is actually direct evidence of Respondent’s animus toward Tyo’s protected activities in the form of Byers’s un rebutted statements to the gathered employees that their

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<sup>10</sup> It is also undisputed that Tyo was a known Union adherent prior to this incident, as she was a member of the Union’s contract bargaining committee, and had attended multiple bargaining sessions with Respondent representatives present.

conduct was “disrespectful” and “unacceptable” behavior. Her chastisement of Tyo further demonstrated her animus toward what Tyo and others were doing.

5 I also find it noteworthy that, while already known to Byers, Respondent’s confirmation of Tyo’s participation in the Byers meeting was information Respondent intentionally and immediately sought to find out. Respondent specifically compiled a list of those participants in order to determine what action to take in response to their “ambush” of Byers. The familiar yet infamous phrase “taking names” comes to mind, along with the well-known implication that retaliation would follow.

10 In addition, I find the timing of Respondent’s decision to investigate Tyo, which it used shortly after as justification for terminating her is further evidence of animus in this case. And I find Respondent’s pretextual claim, discussed below, to bolster this specific finding of animus. Taking all these together, I find more than sufficient evidence to demonstrate Respondent’s animus. See *BS&B Safety Systems, LLC*, 370 NLRB No. 90 (2021), where the Board found  
15 that the General Counsel met its burden of proving Respondent’s animus “rely[ing] only on the timing of the discharge and evidence of pretext as found by the judge.”

20 Accordingly, having met all three elements, protected activity, knowledge, and animus motivating Tyo’s discharge, I find that General Counsel has met its prima facie burden that the discharge was unlawful.

25 I further find that Respondent has not met its burden to demonstrate that the same action would have taken place notwithstanding the protected conduct. Indeed, I specifically find that Tyo would not have been discharged were it not for her having engaged in protected concerted activity. Significantly, no investigation was prompted by Tyo’s departure from the operating room itself, and there is no reason to believe any such investigation would have been conducted in the absence of her protected activity. The only reason any investigation took  
30 place was as a result of Tyo’s protected activity.

In this regard, I find it very telling that the surgeon involved in the operation Tyo was alleged to have abandoned, Dr. Rosner, did not share the hospital administration’s claimed view

that Tyo had engaged in “egregious conduct” as argued by Respondent. To the contrary, Rosner viewed Tyo as one of the top operating room nurses at the facility, singling out Tyo’s adherence to the highest of professional standards.

5           Moreover, Respondent’s claim that Tyo had engaged in patient abandonment on the basis of the facts of this case is utterly unconvincing. Respondent’s primary argument is that Tyo’s act of leaving Lazaro in the operating room without her for 28 minutes during a surgery was so outrageous that they had no choice but to terminate her. Yet, Lazaro had been alone during surgeries for that duration and longer on multiple previous occasions, at the assignment  
10 of management, including at least one surgery that was as complicated or more than the surgery in question.

15           Again, although there were two surgeons and multiple other individuals in the operating room during the surgery, no one present thought enough of this allegedly outrageous act to so much as report it, let alone launch an investigation of it, as one might expect where outrageous conduct has taken place. To the contrary, one of the surgeons, despite being aware of Tyo’s conduct, objected in writing to Tyo’s termination.

20           In short, I am not persuaded that Respondent would have discharged Tyo, a 17-year employee at the hospital, with a positive employment record, who was respected and relied on to serve as preceptor to mentor new nurses til the day she was terminated, had she not engaged in concerted activity days before her discharge. That timing, given the totality of the circumstances in this case, cannot be ignored.

25           Where an employer’s proffered reasons are pretextual - either false or not actually relied on - the employer fails by definition to meet its burden of showing it would have taken the same action for those reasons absent the protected activity. See *Boothwyn Fire Co. No. 1*, 363 NLRB No. 191, slip op. at 7 (2016); *Pro-Spec Painting, Inc.*, 339 NLRB 946, 949 (2003); and *Hays Corp.*, 334 NLRB 48, 49 (2001). I find Respondent’s claim that Tyo committed patient  
30 abandonment to be disingenuous considering the totality of the circumstances here, and therefore, find this defense to be pretext for its unlawful termination in retaliation for Tyo’s protected activity.

Therefore, I find that Respondent has not met its burden under *Wright Line*, and that it cannot prove it would have taken the same action against Tyo even in the absence of her protected activity. Indeed, I find that it would not have discharged Tyo but for the fact that she engaged in that activity.

In sum, I find that Tyo's concerted activity was a substantial and motivating reason for her discharge, and as such, I find the General Counsel has met its initial prima facie burden. With the burden shifted to Respondent to demonstrate that it would have taken the same action even in the absence of the protected conduct, I find that Respondent has failed to meet its burden, for a series of reasons.

Accordingly, I find that Respondent violated Section 8(a)(3) or (1) of the Act when it terminated Tyo on March 13, 2020, and therefore, recommend that Tyo be made whole for the unlawful actions taken by Respondent.

### **Conclusions of Law**

1. On or about March 13, 2020, Respondent violated Section 8(a)(3) and (1) of the Act by unlawfully terminating Rosamaria Tyo's employment in retaliation for her protected union and concerted activity.
2. The above violation is an unfair labor practice within the meaning of the Act.

### **Remedy**

As I have concluded that the Respondent engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Respondent, having discriminatorily discharged Rosamaria Tyo, must rescind its unlawful discipline, offer Tyo reinstatement and make her whole for any loss of earnings and other benefits resulting from that discrimination.



Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). The Respondent shall also file a report with the Social Security Administration allocating  
 5 backpay to the appropriate calendar quarters and shall also compensate the discriminatee for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year. *Don Chavas, LLC d/b/a Tortillas Don Chavas and Mariela Soto and Anahi Figueroa*, 361 NLRB No. 10 (2014).

10 In addition to the backpay-allocation report, Respondent shall file with the Regional Director for Region 2 a copy of Tyo's corresponding W-2 form(s) reflecting the backpay award. *Cascades Containerboard Packaging*, 370 NLRB No. 76 (2021). In addition, Respondent is ordered to reimburse Tyo for all search-for-work-related expenses regardless of whether she received interim earnings in excess of these expenses overall or in any given quarter. *King Soopers, Inc.*, 364 NLRB No. 93 (2016).

15 On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>11</sup>

### ORDER

20 The Respondent, New York Presbyterian Hudson Valley Hospital, its officers, agents, and representatives, shall

1. Cease and desist from

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<sup>11</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Discharging or otherwise discriminating against any employee because they support the Union and engage in concerted activities, or to discourage other employees from engaging in these activities;

5 (b) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

10 (a) Within 14 days from the date of the Board's Order, offer Rosamaria Tyo full reinstatement to her former job, or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

15 (b) Make Rosamaria Tyo whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of the decision, plus reasonable search-for-work and interim employment expenses regardless of whether those expenses exceed her interim earnings.

20 (c) Compensate Rosamaria Tyo for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 2, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.

(d) File with the Regional Director for Region 2 a copy of Rosamaria Tyo's corresponding W-2 form(s) reflecting the backpay award.

25 (e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Rosamaria Tyo and, within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

30 (f) Preserve, and within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel

records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

5 (g) Within 14 days after service by the Region, post at its location in Cortlandt Manor, NY the attached notice marked "Appendix."<sup>12</sup> Copies of the notice, on forms provided by the Regional Director for Region 2 after being signed by the Respondents' authorized representatives, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to the physical posting of paper notices, the notices shall be distributed electronically, 10 such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondents customarily communicate with its employees by such means. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondents have gone out of business or closed the facility involved in these proceedings, the 15 Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 13, 2020.

20 (h) Within 21 days after service by the Region, file with the Regional Director for Region 2 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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<sup>12</sup> If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its employees by electronic means. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Dated, Washington, D.C. August 11, 2021

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A handwritten signature in black ink, appearing to read "Jeffrey P. Gardner", written over a horizontal line.

Jeffrey P. Gardner  
Administrative Law Judge

**APPENDIX**

**NOTICE TO EMPLOYEES  
Posted by Order of the  
National Labor Relations Board  
An Agency of the United States Government**

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

**FEDERAL LAW GIVES YOU THE RIGHT TO**

Form, join, or assist a union  
Bargain collectively through representatives of their own choice  
Act together with other employees for your benefit and protection  
Choose not to engage in any of these protected activities.

**WE WILL NOT** do anything to prevent you from exercising these rights.

**WE WILL NOT** discharge or otherwise discriminate against any employee for engaging in activity protected by Section 7 of the Act.

**WE WILL NOT** in any like or related manner, interfere with, restrain or coerce employees in the exercise of their rights under Section 7 of the Act.

**WE WILL**, within 14 days from the date of this Order, offer Rosamaria Tyo full reinstatement to her former job, or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

**WE WILL** Make Rosamaria Tyo whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, plus reasonable search-for-work and interim employment expenses regardless of whether those expenses exceed her interim earnings.

**WE WILL** compensate Rosamaria Tyo for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 2, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years, along with a copy of Rosamaria Tyo's corresponding W-2 form(s) reflecting the backpay award.

**WE WILL** within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Rosamaria Tyo, and **WE WILL** within 3 days thereafter, notify her in writing that this has been done.

New York Presbyterian Hudson Valley Hospital

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(Employer)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below:

26 Federal Plaza, Room 3614, New York, NY 10278-0104

(212) 264-0300, Hours: 9 a.m. to 5:30 p.m.

You may also obtain information from the Board's website: [www.nlrb.gov](http://www.nlrb.gov).

The Administrative Law Judge's decision can be found at [www.nlrb.gov/case/2-CA-258244](http://www.nlrb.gov/case/2-CA-258244) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE  
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF  
POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER

MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (212) 264-0344.